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WAHAT HJ. YAHYA & ORS.

v.

SIM WI FAT & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU

b

MAHADEV SHANKAR J

[CIVIL SUIT NO. 730 OF 1984]

21 JULY 1986

c

DAMAGES: *Negligence - Injuries sustained in an accident - Comminuted fracture of right tibia and fibula - 0.5 cm shortening of leg - Closed compression fracture of skull lacerations, bruises and scars - Quantum of damages - Evidence to prove claim for special damages.*

d

This was a claim for damages for personal injuries sustained in an accident. Liability was admitted. The first plaintiff sustained the following injuries: a 1.5 cm lacerated wound over the right leg, a comminuted fracture of the lower one third of the right tibia and fibula; residual disabilities; a shortening of 0.5 cm of the right leg, limitation of movement of right ankle, which could lead to osteoarthritis, inward deformity of the lower end of the right tibia and 3 scars on the right leg. The second plaintiff sustained the following injuries; lacerations on the face and two tears on the nose. The third plaintiff sustained the following injuries; closed compression fracture of the frontal bone of the skull and bruises on the left leg. The defendants conceded the second plaintiff suffered loss of earnings for a period of 3 months. She was a tailor earning RM400 per month. The first plaintiff who was superintending marine engineer claimed damages for loss of earning and loss of earning power. He also claimed damages for transport expenses, wages for a servant, damaged clothes and for extra nourishment.

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Held:

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[1] General damages of RM11,000 was awarded to the first plaintiff for pain and suffering and loss of amenities. Special damages in the sum of RM3,550 was awarded for transport expenses, servant's wages and for torn clothes.

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[2] General damages of RM5,500 was awarded to the second plaintiff for pain and suffering. A sum of RM1,200 was awarded as special damages to the second plaintiff for loss of earnings.

[3] General damages of RM6,000 was awarded to the third plaintiff for pain and suffering. There was no evidence to support his claim for loss of earnings and loss of earning capacity. There was no evidence to support the claim for extra nourishment.

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[4] Interest at 4% p.a. was awarded on the special damages from the date of the accident until date of judgment. Interest at 8% p. a. was awarded on the general damages from the date of accident up to the date of judgment. Interest at 6% p. a. was awarded on the decretal sum from the date of judgment until the date of realisation. Costs was awarded to the plaintiff.

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Cases referred to:

Yeap Cheng Hock v. Kajima-Taisei Joint Venture [1973] 1 MLJ 230

Jasi Alam v. Nohya b. Mustar & Anor. [1975] 1 MLJ 166

Other source referred to:

Damages for Personal Injuries and Death - Munkman 6th Edn., p. 70

For the plaintiffs - B.S. Sidhu; M/s. Sidhu & Co.

For the defendants - S.K. Sabapathy; M/s R.K. Nathan & Co.

JUDGMENT

Mahadev Shankar J:

This is a claim for damages for personal injuries sustained in a motor accident which took place on 11 August 1983. Liability has been admitted. Quantum is in issue.

The 3rd plaintiff was 21 years old at the time of the accident. He sustained a closed compression fracture of the frontal bone of the skull. He also sustained bruises at the left leg anteriorly of 2 cm. by 5 cm. According to the medical certificate issued by the Johore Bahru General Hospital he was discharged well on 14 August 1983. He is currently a 2nd year student in the University of Malaya studying Business Administration. There is no evidence before me of any residual disabilities. His claim therefore is purely one for pain and suffering. I award a sum of RM6,000 by way of general damages in this case.

By way of special damages, a sum of RM1,500 has been claimed for extra good food and nourishment. Since this expenditure is alleged to have been incurred by his father, the 1st plaintiff, I shall deal with it hereafter.

The 2nd plaintiff is the mother of the 3rd plaintiff and the wife of the 1st. At the time of the accident, she was about 38 years old and had 7 children. The only injuries listed in the medical report issued by the General Hospital Johore Bahru are:

- (1) Laceration (R) upper eye lid - (a) 1 cm laterally, (b) 3 cms medially.
- (2) Laceration (L) upper eye lid - 1 cm
- (3) Laceration (L) forehead - 1 cm
- (4) Tear (L) ala of the nose - 1 cm
- (5) Tear (R) ala of the nose - 1 cm
- (6) Laceration (L) side of the upper lip - 4 cm.

She was put under observation. The lacerations were sutured. She was discharged well, a week later, on 18 August 1983.

There is no mention in this medical report of any other injury to this plaintiff.

On 30 June 1986 this plaintiff was examined again by Dr. Mahmood Merican at Kuala Lumpur. In his medical report Dr. Merican has listed scars observed at the site of the lacerations and tears listed in the earlier medical report of the General Hospital Johore Bahru.

In addition he has also mentioned a chipped right upper incisor tooth. But there was absolutely no evidence before me that this injury was sustained in the accident.

In addition to the medical reports I also had the opportunity of observing this plaintiff in the witness box.

Unless she is looked at very closely, the scars in question are not particularly noticeable. I therefore consider RM5,500 a proper award to her by way of general damages.

By way of special damages this plaintiff claimed a loss of RM400 a month attributable to her inability to carry on her business as a tailor during the period of her disability. In the writ

- a* and statement of claim which was filed on 11 November 1984 it was asserted that this disability had persisted up to that time and was still continuing.

No evidence whatsoever was led either through the mouth of this plaintiff or any of the doctors as to the length of time for which her disabilities persisted in such a manner as to prevent her from carrying on with her tailoring business after she left the hospital. Defence Counsel was however prepared to concede a period of 3 months which I think is reasonable and I therefore award RM1,200 under this head.

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There was also a claim for RM50 for damage to clothing which has been conceded.

In her case also there is a claim for RM1,500 for extra good food and nourishment which I will deal with shortly.

- c* The 1st plaintiff was the major casualty in this accident both in terms of personal injuries and monetary loss.

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At the time of the accident he was 43 years and by occupation a Superintending Marine Engineer. He had earlier received his training in the British Army in Singapore. He had spent 4 years in the UK and apart from serving with the Gurkha Engineers, he also had experience with various army units around Malaysia. On 1 January 1981 he commenced his duty as Superintending Marine Engineer for Mashaha Holdings Sdn. Bhd. The company had 8 coastal tankers for which this plaintiff was responsible. The letter of appointment clearly specifies that his duties were of a supervisory nature. Consequently he had to inspect the company's vessels and ensure that they were properly maintained by the engineering crew, check stores on board vessels, and ensure their proper management. He also had to oversee discipline among the engineering crew and when required to serve as replacement Chief Engineer. He was also put in charge of the sales of marine equipment and supplies to the vessels. For these duties he was paid the salary of RM1,800 per month with a fixed monthly travelling allowance of RM200 and enjoyed other benefits. However his contract could be terminated on one month's notice or one month's salary in lieu of notice.

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By a letter dated 14 April 1981 this plaintiff was informed by the company that he had been placed on the executive service scheme. The scale of salary was as follows:

Time-Scale:

RM750 x RM70 x 3 years = RM960
RM960 x RM100 x 3 years = RM1,260
RM1,400 x RM140 x 5 years = RM2,100
(Promotional Bar)

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Super-Scale:

RM2,250 x RM200 x 5 years = RM3,250

In accordance with this scheme, this plaintiff had a salary adjustment of RM1,820 starting from 1 April 1981.

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According to this plaintiff's pay record which was produced by Encik Ahmad Azlee the Financial Manager of the company, as from January 1983 this plaintiff was already in receipt of RM2,100 a month plus RM300 by way of travelling allowances. It was therefore evident that he had already been promoted by then and was on the Super-Scale in the executive service scheme. It is therefore a reasonable inference that this plaintiff performed his duties at least up to that time, to the full satisfaction of his employers.

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After the accident on 11 August 1983, this plaintiff continued to receive his full salary and all allowances as before. In January 1984 he received his annual increment bringing his basic salary up to RM2,250. He continued to receive this salary until May 1984. There is then an entry in the wage record "Resigned". It is said that this entry is a mistake.

This may well be so because on 23 April 1984 Mashaha Holdings Sdn. Bhd. issued this plaintiff with a termination letter. The grounds stated therein are:

In the course of performing your duties we have noted that you have been mainly doing repair work instead of carrying out duties of inspection of our vessels and upgrading of the performance of our engineering crew which are your main functions. As a result, the company has not noticed any appreciable improvement of the performance of their duties resulting in constant breakdown of our vessels and high costs of repairs altogether bringing about considerable losses to the company. The company is now in no position to continue to bear such burden and since the objective in securing you as the Superintending Marine Engineer has not been well served, it is with regret that we have to terminate your service with the company with immediate effect by giving you one month's salary in full in lieu of notice in accordance with the terms of your appointment. We are also giving you full salary for the month of April 1984 although you need not have to serve the company for the rest of the month after receiving this notice of termination.

I do not think it would be unreasonable to say that the effect of this letter was a summary dismissal of the plaintiff because he concerned himself substantially with the manual work of carrying out repairs himself, instead of fulfilling his duties in a supervisory capacity in a manner which would have brought about a reduction of repair costs and an improvement in the quality of the performance of the engineering crew.

There is no evidence before me that these grounds were challenged by this plaintiff.

On 17 October 1984 this plaintiff obtained employment with Jahre Shah Shipping Sdn. Bhd. as a Chief Engineer at a commencing salary of RM1,600 per month effective from 20 October 1984. According to the company's secretary who gave evidence this plaintiff continued in employment in that capacity only up to 4 July 1985 because on that day the ferry service operated by this company ceased and the only ship the company had was laid up. The witness added that this plaintiff was a good worker and that his performance was of high standard.

Slightly more than a month later, on 15 September 1985, this plaintiff commenced employment once again as a Superintending Marine Engineer with Hasnah Shipping and Chartering Sdn. Bhd. at a salary of RM1,800 per month and allowances of RM200 per month. At the date of the trial he is still employed in this company. Hasnah has two vessels which carry refined petroleum between Port Dickson and East Malaysia. Captain Mustafa bin Mohd. Ali who is the Executive Chairman of Hasnah gave evidence. He spoke highly of the plaintiff's work and the only complaint he made about this plaintiff is that when major breakdowns occur, this plaintiff is not fully able to lift heavy loads or get at awkward areas in the engine room without some difficulty in bending and so on.

When this plaintiff was admitted to the Johore Bahru General Hospital after the accident, he was found to have sustained a 1.5 cm lacerated wound over the right leg and a comminuted fracture of the lower one-third of the right tibia and fibula. After treatment he was discharged from the ward on 27 August 1983 and at his request referred to Assunta Hospital Petaling Jaya for further follow-up. By then he was able to ambulate with crutches but the leg was still in plaster cast.

- a** He was first seen at Assunta on 7 September 1983. The delay in reporting is not explained. The cast was removed and x-rays revealed the fractures were overlapped giving rise to a shortening. Open reduction, internal fixation, and bone grafting was done. Check x-rays of the post operative reduction of the fractures were satisfactory. When he was seen on 5 December 1983 the doctor certified that the fractures were progressing to union and that he was still being regularly reviewed. On 9 January 1985 this plaintiff was seen by Dr. Pretam Singh. He observed that this plaintiff had a normal gait although the right leg was shorter than the left by approximately 0.5 cm.
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Examination of the right leg showed that dorsi flexion and plantar flexion of the right ankle joint was each reduced by approximately 10°. There was also an inward deformity of the lower end of the right tibia.

- c** There were three scars ranging 8 cm. to 12 cm. on the right iliac crest, the lateral aspect of the right leg, and the anterior aspect of the lower right tibia. X-rays showed that the fractures had healed but that the lower end of the right tibia was tilted inwards, leading to obliquity of the right ankle mortise. Dr. Pretam Singh thought that the injury would pre-dispose this plaintiff to osteoarthritis in the right ankle. There was a possibility of a requirement for further surgery for the removal of the metal plate and screw. There was also a possibility of improvement in the range of movement in the right ankle the degree of which Dr. Pretam Singh could not ascertain at the time of the examination.
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On 30 June 1986 this plaintiff was again examined, this time by Dr. Mahmood Merican. He did not find any significant change in the condition of this plaintiff. However his report does not mention any necessity for a further operation.

- e** This substantially is the evidence upon which the following figures have been submitted for this plaintiff:

f	(1) For the comminuted fracture	-	RM 30,000
	(2) For the 0.5 cm shortening	-	RM 3,500
	(3) For the osteoarthritis	-	RM 2,000
	(4) For the 3 scars	-	RM 5,000
	(5) For the deformity in the ankle	-	RM 10,000
	(6) For the future operation	-	RM 10,000
g	(7) For actual loss of earnings represented by the reduced sum earned by the plaintiff from May 1984 up to date of the trial	-	RM 20,400
	(8) For loss of earning power representing the reduced amount the plaintiff would earn up to the age of 55	-	RM 86,850
h	Total		RM167,750

In the case of *Yuen Sow Ying & Anor. v. Hedzir bin Daud* (Johore Bahru High Court Civil Suit No. 485 of 1982) I had the occasion to make some adverse comments about this method of calculation. In several previous decisions in this Court I have also had occasion to observe that plaintiffs who come to Court cannot simply make claims for damages.

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I regret to say that I was wholly unable to reconcile either the authorities cited or the evidence presented with the claims made on the plaintiff's behalf.

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A realistic estimate in the first place would surely be less likely to produce acute disappointments later.

Taking the best view that I can on the matter I consider that the proper award in this case for pain and suffering, loss of amenities, and the shortening, osteoarthritis, and scar and the limitation of movement in the ankle is a round sum of RM11,000.

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I find myself unable to make any award for a possible future operation. Not only was there no evidence whatsoever as to what this would cost, but also there was no evidence that on the balance of probabilities such an operation would be an inevitable necessity.

As for the claim for loss of earnings and loss of earning capacity, I am once again faced with the insuperable difficulty that all the evidence here pointed to the inference that this accident did not in any way diminish the plaintiff's capacity to do the work for which he was trained. Unless it can be clearly shown that it was as a direct result of the injury that the plaintiff lost his job or sustained a reduction of his earning capacity such a claim is misconceived.

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This brings me to the special damages claimed for expenditure incurred by him for himself and other plaintiffs.

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Although on the high side I allow the transport expenses of RM1,500 for the 5 visits made by plaintiff's family from Kuala Lumpur to Johore Bahru. I also allow the transport expenses of RM220 for the visits to Assunta Hospital.

The wages of a servant for 6 months for RM1,800 has been conceded and there will be an award for this as also for a sum of RM50 for the damaged trousers of the plaintiff.

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What is left is the claim for extra good food and nourishment which is said to be RM1,500 for each of the three plaintiffs making a total claim of RM4,500 in all.

The accident took place on 11 August 1983. The writ was filed on 19 November 1984. It is reasonable to infer that the plaintiff's solicitors were instructed sometime before the writ was filed. Yet not a single document was adduced to show what this extra good food and nourishment was. Nor was there any oral evidence given as to whether this consisted of chicken soup or chicken essence or whatever.

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Counsel for the defendant contended, quite correctly and in line with the existing authorities, that this claim must be rejected unless there was positive medical evidence to show that such good food and nourishment was medically prescribed as a necessity for recovery.

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Having said all this, I cannot ignore the fact that it is commonplace in Malaysia for victims of traumatic injuries to increase their intake of proteins, fruits or herbal mixtures in the belief that this will assist them towards a speedy recovery. Where there is positive evidence of reasonable expenditure incurred in this direction, it is my view that there is room for sympathetic consideration of such claims.

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But in the instant case, I am unable to make any such award not only because of the absence of evidence, but also because I feel myself bound by the decisions of *Yeap Cheng Hock v. Kajima Taisei Joint Venture* [1973] 1 MLJ 230 and *Jasi Alam v. Nohya b. Mustar & Anor.* [1975] 1 MLJ 166. And see *Munkman - Damages for Personal Injuries and Death* 6th Edn. p. 70.

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a In the result the defendants must pay the plaintiffs the following sums by way of general and special damages:

(1) To the 1st plaintiff:

General damages - RM11,000

Special damages - RM 3,500

b (2) To the 2nd plaintiff:

General damages - RM 5,500

Special damages - RM 1,250

(3) To the 3rd plaintiff:

General Damages - RM 6,000

c There will be interest at 8% on the general damages from the date of the accident up till today. Also interest at 4% on the special damages from the date of accident up till today.

The interest on the decretal amount awarded to each plaintiff will run at 6% from today till realisation.

The defendants will also pay the plaintiffs the costs of this action.

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Also found at [1988] 1 CLJ 849

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